

National Labor Relations Board



Weekly Summary of NLRB Cases

Division of Information

Washington, D.C. 20570

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April 16, 2004

W-2943

CASES SUMMARIZED
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Georgia Power Co. (10-CA-33301; 341 NLRB No. 77) Gainesville, GA April 7, 2004. The Board agreed with the administrative law judge that the Respondent violated the Act by failing and refusing to promote employee Bobby Lewallen to a supervisory position because he engaged in protected concerted activities. Chairman Battista and Member Schaumber, with Member Walsh dissenting, did not agree with the judge's recommendation that the Respondent offer Lewallen a promotion to the supervisory position. Citing *NLRB v. Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982), the majority ordered that the Respondent reconsider Lewallen for a supervisory position, pay Lewallen backpay at the rate he would have received if he had been selected for the supervisory position, and continue to pay him at the supervisory rate until such time as he is promoted to a supervisory position. [\[HTML\]](#) [\[PDF\]](#)

Although Chairman Battista and Member Schaumber rejected the Respondent's position that the Board lacked the authority to order Lewallen promoted to a supervisory position because such positions are not covered by the Act, they found merit in the Respondent's contention that the judge's proposed remedy potentially infringed on the Respondent's managerial hiring prerogatives. Because Lewallen had never held a supervisory position and had never been selected by the Respondent's management to be a supervisor, Chairman Battista and Member Schaumber said "by ordering his promotion to the supervisory ranks at this time we would be effectively assuming the 'managerial responsibility of weighing a wide variety of factors involved in [the] decision' as to whether Lewallen is suitable for a supervisory position." *Ford Motor Co.*, supra at 159. Accordingly, they chose not to assume that "managerial responsibility" and left to the Respondent the ultimate decision as to whether Lewallen should be offered a supervisory position.

Member Walsh concluded that his colleagues' refusal to order the Respondent to offer a promotion to Lewallen denied Lewallen a permissible and effective remedy, and substituted in its place a punitive one. He said their concern about the Board's involvement in the supervisory selection process is unfounded, explaining:

By rejecting the Respondent's defense that Lewallen would not have been selected for the supervisory position for legitimate business reasons, we are effectively finding that the Respondent would have selected Lewallen absent his protected activity. Thus, ordering the Respondent to do that which it would have done had it been acting lawfully would not be usurping the prerogative of management to select its workforce. Because the Respondent's selection committee determined that Lewallen is qualified for the position, we would not be ordering the Respondent to promote an unqualified individual to the supervisory ranks or be substituting our business judgment for that of the Respondent. For these reasons there is no impediment to the remedy recommended by the judge.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Bobby Lewallen, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Atlanta on Nov. 22, 2002. Adm. Law Judge Lawrence W. Cullen issued his decision Dec. 9, 2002.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Southwest Regional Council of Carpenters and Carpenters Local 1506 (Held Properties, Inc. and The Laser Institute for Dermatology & European Skin Care) Santa Monica, CA April 2, 2004. 31-CC-2115, 2117; JD(SF)-24-04, Judge Burton Litvack.

CMC Electrical Construction and Maintenance, Inc. (Electrical Workers [IBEW] Local 363) Wallkill, NY April 5, 2004. 2-CA-35489; JD(NY)-13-04, Judge Howard Edelman.

Ingham Regional Medical Center (Office and Professional Employees Local 459) Lansing, MI April 7, 2004. 7-CA-46380, 46549; JD-30-04, Judge Jane Vandeventer.

E.L.C. Electric, Inc. (Electrical Workers [IBEW] Local 481) Indianapolis, IN April 7, 2004. 25-CA-28270-1, et al.; JD-23-04, Judge Ira Sandron.

Parkview Hospital, Inc. (Ohio Nurses Association – United American Nurses) Columbia City, IN April 9, 2004. 25-CA-28821; JD-27-04, Judge William G. Kocol.

DTR Industries, Inc. (Auto Workers) Bluffton, OH April 9, 2004. 8-CA-33708-1; JD(ATL)-20-04, Judge John H. West.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

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***(In the following cases, the Board denied requests for review
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Safeway Stores, Inc., Baltimore, MD, 4-RD-1997, April 7, 2004

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Miscellaneous Board Orders

**ORDER/overruling Petitioner's Objections Nos. 1 and 4
and remanding proceeding to Regional Director for
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Community Action Agency of Columbiana County, Inc., Lisbon, OH, 8-RC-16577, April 8, 2004
